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No. 10-100

IN THE

Supreme Court of the United States

ROBERT L. BERGBAUER and MARIE T. BERGBAUER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an agreement by parties to a sale that income to the seller shall be immediately taxable, despite the lack of control by the seller of the income and a risk that the income will be forfeited, supersede provisions of the Internal Revenue Code and regulations that mandate taxation only when a taxpayer comes into control of income and any risk of forfeiture of that income has lapsed?

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Robert L. Bergbauer and Marie T. Bergbauer respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 602 F.3d 569.

The district court's memorandum opinion granting Respondent's motion for summary judgment and denying Petitioner's motion for summary judgment (Pet. App. 28a - 55a) is unreported but available electronically at 2008 WL 3906784. The accompanying order (Pet. App. 56a - 57a) is unreported.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on April 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves 26 U.S.C. § 451(a), 26 C.F.R. § 451-1(a), 26 C.F.R. § 451-2(a), and 26 C.F.R. § 1.1060-1(e). These provisions are lengthy and are therefore set out in Appendix D in accordance with Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

This case presents an important question concerning the ability of parties to a sale to determine for themselves, in derogation of the provisions of the Internal Revenue Code (Code) and the regulations thereunder, when the

income to the sellers should be taxable. The Code and regulations dictate that income for a cash basis taxpayer should be taxable only when that income is actually or constructively received. In disregard of these provisions, the Fourth Circuit – and several other courts that have considered the same transaction[1] – concluded that the income from the sale in question should be taxable upon the closing of the sale solely because the parties intended that the sale should be then taxable despite the absence of actual or constructive receipt of the income at that time.

In its holding, the Fourth Circuit ignored relevant decisions of this Court. These decisions have consistently held that "the propriety of a [tax treatment] does not turn upon general equitable considerations," such as the intentions of the parties. *Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 148 (1974). "Rather, 'it depends upon legislative grace; and only as there is clear provision therefor can any particular [tax treatment] be allowed.'" *Id.* at 149 (quoting *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934)).

Specifically, in holding that petitioners Marie and Robert Bergbauer were immediately taxable upon income credited to Robert Bergbauer but not made available to him and subject to a substantial risk of its subsequent forfeiture, the Fourth Circuit declined to give effect to a tax principle enunciated in a leading decision of this Court later reflected in section 1.451-2(a) of the Treasury

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1. *United States v. Fletcher*, 562 F.3d 839 (7th Cir. 2009);*United States v. Fort*, 2010 WL 2104671 (N.D. Ga. 2010); *United States v. Nackel*, 686 F. Supp. 2d 1008 (C.D. Cal. 2009); *United States v. Berry*, 2008 WL 4526178 (D.N.H. 2008); *United States v. Culp*, 2006 U.S. Dist. LEXIS 95030 (M.D. Tenn. 2006).

Regulations that a taxpayer cannot be taxed on income that the taxpayer has "no right . . . to demand . . . [and] which [the taxpayer] might never receive." *North Am. Oil Consol. v. Burnet*, 286 U.S. 417, 423 (1932); 26 CFR 1.451-2(a) ("income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions"). If allowed to stand, this holding would invite parties to transactions giving rise to taxable income to determine on the basis of their own financial circumstances and not upon application of the Code and regulations when that income is taxable to the intended recipient of the income with likely substantial cost to the nation's tax revenues and confusion in the administration of the tax laws.

A. Facts of the Transaction

On May 23, 2000, Cap Gemini, S.A. (Cap Gemini) acquired the consulting business of Ernst & Young LLP (Ernst & Young). Pet. App. 29a. At the time of the acquisition, Robert Bergbauer was an Ernst & Young consulting partner situated in the United States. Upon the closing of the transaction (Closing), Robert Bergbauer became an employee of a Cap Gemini affiliate, Cap Gemini Ernst & Young (CGE&Y), established to take over the consulting business. Pet. App. 29a.

The transaction documents consisted principally of a Master Agreement, a Consulting Party Transaction Agreement (CPTA), and an agreement establishing for each selling shareholder the terms for operation of a restricted brokerage account (Special Account Instruction Agreement). Pet. App. 6a. Pursuant to these documents (Transaction Documents), Robert Bergbauer and the

other selling partners were credited with shares of stock in Cap Gemini in return for their interests in Ernst & Young.

The Transaction Documents provided that only twenty-five percent (25%) of the shares of stock that each selling partner was ultimately to receive was immediately salable by the partners. The remaining seventy-five percent (75%) of the shares were deposited by Cap Gemini at the Closing directly into the restricted accounts set up by the Special Account Instruction Agreement (Restricted Accounts) to be released ratably to the selling partners in the year following the Closing and the subsequent four years. Pet. App. 3a - 4a.

The Special Account Instruction Agreement gave control over the Restricted Accounts to an official of CGE&Y. Except for credit to the selling partners for dividends distributed on the shares in the Restricted Accounts and except for a right to instruct the CGE&Y official as to the voting of the shares, the selling partners enjoyed no benefit from the shares in the Restricted Accounts. As the District Court described the provisions of the Transaction Documents related to the shares in the Restricted Accounts:

> Specifically, under the CPTA, Bergbauer could not "directly or indirectly, sell assign, transfer, pledge, grant any option with respect to or otherwise dispose of any in interest in" Cap Gemini Shares, except in periodic offerings organized by Cap Gemini for a period of four years and 300 days after the closing. Second, Bergbauer granted Cap Gemini exclusive authority to invest, transfer and release the

> shares in his Merrill Lynch Restricted Account during the time period. Third, under the liquidated damages clause of the CPTA, Bergbauer agreed that he would forfeit some or all of the Cap Gemini shares if he breached provisions of the employment agreement with CGE & Y, voluntarily ended his employment or was terminated "for cause" or "poor performance."

Pet. App. 48a - 49a (citations to record omitted).

As to the substantiality of the risk that Robert Bergbauer might forfeit shares in his Restricted Account, any voluntary resignation from employment was under Robert Bergbauer's control. He could also regulate breaches of his employment agreement which contained provisions related to non-competition and the maintenance of the confidentiality of CGE&Y information. Pet. App. 6a. The Transaction Documents did not define the term "cause" (Pet. App. 49a n.4), but Robert Bergbauer could be expected to have some control over whether he might give "cause" for his termination and forfeiture of shares.

The same cannot be said for any termination of Robert Bergbauer's employment for "poor performance." While the term was not defined in the transaction documents (Pet. App. 49a n.4), the meaning was given substance in a summary of the transaction entitled "Partner Information Document" (PID) distributed to the selling partners by Ernst & Young on March 2, 2000, about seven weeks prior to the Closing. Pet. App. 30a. The PID construed "poor performance"

to mean "any reason other than for cause." Joint Appendix, 4th Cir., at A283. Robert Bergbauer accordingly faced dismissal and the forfeiture of shares in the Restricted Account whenever CGE&Y chose to terminate his employment, whether or not the precipitating circumstances were ones over which Robert Bergbauer could have any influence. [2]

B. Petitioners' Tax Returns

Notwithstanding Robert Bergbauer's lack of beneficial enjoyment of the shares in the Restricted Account and the substantial risk that Robert Bergbauer would forfeit shares, the Bergbauers' joint tax return for the year 2000, prepared for them by Ernst & Young, included the full value of the shares credited to Robert Bergbauer at the Closing. Pet. App. 37a. The Transaction Documents themselves contained no language dictating when the proceeds were to be taxable to the selling partners. Pet. App. 6a. The PID, however, in language that the Court of Appeals found evinced the intent of the parties, recited that, "For all . . . partners . . . [t]he gain on the sale of the

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2. The case of *Palowitch v. Cap Gemini Ernst*, 6 Misc.3d 1001(A), 2004 WL 2964426 (N.Y. Sup. Ct. 2004) evidences the breadth of the discretion to declare a forfeiture claimed by Cap Gemini. In that case, a partner sued Cap Gemini in connection with his dismissal and the confiscation of all of the shares in his Restricted Account. According to the court decision in the case upholding an arbitration award in the partner's favor, Cap Gemini terminated the partner's employment "without stating a reason" and defended its conduct on the basis that it was authorized to do so under the "poor performance" termination provision of the transaction documents. 2004 WL 2964426 at *1.

distributed [CGE&Y] shares is reportable on Schedule D of your U.S. federal income tax return for 2000." Pet. App. 5a. The return also reflected a Form 1099-B issued to Robert Bergbauer by Cap Gemini that showed the full value being distributed at the Closing. Pet. App. 37a.

On or about June 3, 2003, the Bergbauers filed an amended federal income tax return for the 2000 tax year. Pet. App. 37a - 38a. The Bergbauers' amended return reported that Robert Bergbauer had received in 2000 only the shares that had not been deposited into the Restricted Account. Pet. App. 9a. In their amended return, the Bergbauers explained that they were not otherwise taxable on the shares due to the "lack of control over the remaining Seventy-Five (75%) of the stock in the trust." Pet. App. 9a.

The Internal Revenue Service (IRS) initially reviewed and accepted the amended return and provided a refund to the Bergbauers for the taxes paid on the shares in the Restricted Account. Pet. App. 9a. Subsequently, the IRS changed its position and brought a civil action in the United States District Court for the District of Maryland against the Bergbauers under section 7405 of the Code seeking return of the refunded amount. Pet. App. 9a - 10a. Following discovery, the parties filed cross motions for summary judgment. Pet. App. 10a.

C. District Court Decision

The District Court awarded summary judgment to the Government and denied summary judgment to the Bergbauers. Pet. App. 55a. The District Court evaluated the taxability of the shares according to what it described as a "two-pronged, 'economic reality' test." Pet. App. 54a. This test derives from the Fourth Circuit decision in *Gen. Ins. Agency Inc. v. Comm'r*, 401 F.2d 324 (4th Cir. 1968), and "examines the tax consequences contemplated by the parties and the economic substance of the agreement." Pet. App. 43a. The District Court held that, based upon the "extrinsic evidence" of the language in the PID, "the parties original intent was for the [selling partners] to be immediately taxable on the entirety of the shares they received at the transaction's closing on May 23, 2000." Pet. App. 53a. Since, according to the District Court, such taxation also furthered "real economic purposes," the Bergbauers were obligated to report their income in accordance with the parties' intention. Pet. App. 54a.

The District Court made mention of section 451 of the Code and the regulations thereunder, noting in a footnote that, in accordance with section 1.451-2(a) of the Treasury Regulations, "If the taxpayer's ability to control the account 'is subject to substantial limitations or restrictions,' then the income is not deemed to have been constructively received." Pet. App. 48a n.3. The District Court cited these provisions only to establish, however, that the transaction documents, which contained such limitations or restrictions, did not reveal the intent of the parties. Pet. App. 49a. In other words, the District Court viewed the Code only as a backdrop

for the parties' decision as to when the shares should be taxable. In the view of the District Court, the fact that the parties may have included impediments to the sellers' realization of any value from the shares placed in the Restricted Account merely suggested that the parties may have intended that the shares not be taxable when placed in the Account. The Code figured in the District Court's calculus simply as a device to divine party intent and not as an independent basis for governing when the shares might be taxable.

D. Court of Appeals Decision

The Bergbauers noted a timely appeal from the decision of the District Court. Pet. App. 11a. Following oral argument, the Fourth Circuit of Appeals affirmed the decision of the District Court. Pet. App. 2a. In reaching its decision, the Court of Appeals gave fuller consideration to the operation of the Code and regulations.[3] Like the District Court, however, the Court of Appeals chose to disregard that operation when the results might conflict with the intention of the parties. The Court of Appeals explicitly stated, "If Robert Bergbauer had received the Cap Gemini stock in the absence of an agreement, but subject to the forfeiture

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3. In its decision, the Court of Appeals dismissed an argument allegedly made by the Bergbauers premised on the applicability of section 83 of the Code. Pet. App. 24a. The Bergbauers did not argue that section 83 of the Code applied by its terms but rather that, since Robert Bergbauer received his shares in order to protect the continued availability to CGE&Y of his services, the constructive receipt rules of section 83 of the Code having to do with the taxability of property received for services could prove instructive.

and restricted transfer provisions [of the Code and regulations], his timing argument for the year of income recognition might have more credence." Pet. App. 25a. Giving primacy to the parties' agreement over the contravening dictates of the Code, the Court of Appeals went on to state, "As the legion of caselaw set forth above clearly illustrates, a taxpayer's choice of tax treatment under a binding contract is not an optional commitment." Pet. App. 25a.

The Court of Appeals decision does identify a number of decisions standing for the proposition that an agreement between parties to a transaction as to the tax treatment of the transaction can bind the parties and, effectively, the IRS. But not a single one of these cases, nor any other cases that the Court of Appeals might have adduced, has held that an agreement of the parties can bind the parties and the IRS to a result contrary to that dictated by the Code and regulations. Indeed, the one case cited by the Court of Appeals which addressed the instant issue, the time when income is taxable, reached the result urged here by Petitioners that language in an agreement reflecting an intention of the parties must be disregarded if that language posits a date for taxability other than the date of actual receipt. In that case, *Signet Banking Corp. v. Comm'r*, 118 F.3d 239 (4th Cir. 1997), the court determined that a credit card charge identified in the card issuer agreement as an "annual membership" fee was, notwithstanding the label, a one time flat exaction and, despite the apparent contrary intention of the parties, was income to the issuer in the year paid. *Id.* at 241. In language highly instructive here, the court held, "For obvious reasons, a taxpayer's classification of its own transaction cannot determine the appropriate tax treatment." *Id.* at 242.

E. Application of the Provisions of the Code and Regulations

The Code gives no discretion or latitude to parties to determine *when* income shall be taxable. The Code specifically provides the "[t]he amount of any item of gross income shall be included in the gross income *for the taxable year in which received by the taxpayer.*" 26 U.S.C. § 451(a) (emphasis added). Receipt for this purpose can be actual receipt or constructive receipt. 26 C.F.R. § 1.451-1(a) ("Gains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer.").

It is clear that Robert Bergbauer did not *actually* receive for tax purposes the shares placed in the Restricted Account at the Closing. To be *actually* received, income must be "actually reduced to a taxpayer's possession." 26 C.F.R. § 1.451-2(a). The shares did not come within his actual possession. Rather, they were deposited directly by Cap Gemini at the Closing into the Restricted Account and could not be transferred by Robert Bergbauer except as they were released upon the lapse of the restrictions on the forfeiture of the shares. In the absence of full dominion over the shares, Robert Bergbauer could not actually receive them for tax purposes. *See, e.g., Mac Sim Bar Paper Co. v Comm'r*, 1941 WL 10335 (B.T.A. 1941) (seller of business did not actually receive, and was not taxable on the value of, shares placed with escrow agent because he did not exercise "dominion and control" over them); *see also, to similar effect, Goetze Gasket & Packing Co., Inc. v. Comm'r*, 24 T.C. 249, 255 (1955); *Hall v. Comm'r*,

15 T.C. 195, 200 (1950), *aff'd.*, 194 F.2d 538 (9th Cir. 1952); *Int'l Trading Co. v. Comm'r*, T.C. Mem. 1958-104, 1958 WL 877, *aff'd on other grounds*, 275 F.2d 578 (7th Cir. 1960); *Appeal of Schneider*, 3 B.T.A. 920, 923, 1926 WL 865 (1926) (holding that taxpayers were not taxable on shares placed in escrow to secure future services despite the enjoyment by the taxpayers of full dividend and voting rights).

Similarly, Robert Bergbauer did not constructively receive the shares that were placed into the Restricted Account. Pursuant to the Treasury Regulations, income is *constructively* received when it is "credited to [the taxpayer's] account, set apart for him, or otherwise made available to him so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions." 26 C.F.R. § 1.451-2(a).

The regulations go on to cite as an example of the absence of constructive receipt a circumstance substantially indistinguishable from the instant one. "[I]f a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt." *Id.* The stock deposited in the Restricted Account was issued in Robert Bergbauer's name, i.e., it was credited to Robert Bergbauer on the Cap Gemini books. Yet the stock, in order to secure to CGE&Y the value of Robert Bergbauer's services, was not made *available* to Robert

Bergbauer until the years following the Closing when certain conditions beyond Robert Bergbauer's control, including his continued employment, had been met.

No agreement or intention by a taxpayer to accelerate the time of taxation as otherwise determined under the Code and regulations can be effective. *See, e.g., Weil v. Comm'r*, 173 F.2d 805, 806 (2d Cir.), *cert. denied*, 338 U.S. 821 (1949) (sustaining a challenge by the Government to the reporting by executors of fees in a year prior to when dictated by the rules of constructive receipt); *see also Ware v. Comm'r*, 906 F.2d 62, 65 (2d Cir. 1990) (law firm not entitled to recognize as income fee held in escrow account subject to dispute with client until the dispute resolved); *cf. Williams v. United States*, 219 F.2d 523, 527 (5th Cir. 1955) (the placement of the proceeds of a sale of timber in an escrow account to defer their taxation to the sellers was ineffective when the sellers faced no meaningful risk of not ultimately obtaining the proceeds, with the court finding that "the self-imposed limitation of the escrow device did not in fact and in law change the situation so as to make the funds any less available to [the sellers], and constructively received by them").

F. Other Decisions Passing upon Transaction

The final decisions in the other cases addressing the tax consequences to selling partners of the instant transaction share the shortcoming of the Fourth Circuit decision in either disregarding or minimizing the impact of the Code and regulations in favor of giving decisive effect to the perceived intention of the parties that the full proceeds to the partners be taxable at the Closing.

See United States v. Fletcher, 562 F.3d at 844; *United States v. Fort*, 2010 WL 2104671 at *2; *United States v. Nackel*, 686 F.Supp.2d at 1023; *United States v. Berry*, 2008 WL 4526178 at *6; *United States v. Culp*, 2006 U.S. Dist. LEXIS 95030 at *63.

Arguably the most complete discussion of the Code and regulations appears in *Fort* in which the court, after a reference to the relevant statutory provisions, concludes that they do not bar immediate taxation because the selling partner "still exercised substantial control over all of the shares in 2000." *United States v. Fort*, 2010 WL 2104671 at *2. Apart from the ability of the selling partners to receive dividends and to direct how the shares were voted, the bases for this finding are unavailing. An assertion that the selling partners "alone stood to gain or lose money based on the stock's performance" is incorrect in that the benefit of any appreciation or depreciation in the value of the forfeited shares would redound to Cap Gemini, and this fact is, in any event, a circumstance of limited significance in determining control in view of the inability of the selling partners to realize any such appreciation or depreciation during the time the shares were in the Restricted Accounts. The other contentions in *Fort*, that the selling partners agreed to the restrictions or limitations and agreed to a discount from market in the value of any shares that became taxable, simply avoid the question of the effect of the restrictions and limitations, the question that is central to the analysis contemplated by section 451 and the regulations thereunder.[4]

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4. The decision also cites three early cases that were first mentioned by the court in *Fletcher* for the proposition that stock held in escrow to secure a party's performance may yet be

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REASONS FOR GRANTING THE PETITION

The Court of Appeals decision gives primacy to the intentions of the parties to a sale transaction as to the timing of the taxation of the proceeds of the sale over the contrary dictates of the Code and regulations. The Court of Appeals may have had laudable motives in so deciding. As it asserted, "This precept [of binding parties to an agreement to the tax treatment they elected] not only maintains the vital public policy of enforcing otherwise valid contracts, but also assures the reliability of agreed tax consequences to the public fisc." Pet. App. 16a. Regrettably, the Court's decision not only fails to further these compelling goals, but, if allowed to stand, would eviscerate decisions of this Court by elevating form over substance and by permitting taxpayers to determine the tax consequences of transactions without regard to the contrary dictates of the Code and regulations.

First, it should be noted that the Court of Appeals decision in no way advances the sanctity of contracts or protects against deleterious consequences to the public treasury. As for the importance of binding parties to

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considered to have been received when first deposited. *United States v. Fort*, 2010 WL 2104671 at *2; *see, also, United States v. Fletcher*, 562 F.3d at 844. Not only are the cases readily distinguishable on their facts, but any relevant learning from those cases has been superseded by more recent decisions treating facts more similar to the instant ones. *See Goetze Gasket & Packing Co., Inc. v. Comm'r*, 24 T.C. at 255; *Hall v. Comm'r*, 15 T.C. at 200; *Int'l Trading Co. v. Comm'r*, T.C. Mem. 1958-104, 1958 WL 877.

their bargains, the Court of Appeals position might have merit if this case represented a dispute as to the enforcement of a provision of an agreement resolving a matter within the province of the parties to determine. The timing of taxation of the proceeds of a sale, however, is squarely addressed by the Code and regulations. *See* 26 U.S.C. § 451(a); 26 C.F.R. §§ 1.451-1(a) and 1.451-2(a). The Bergbauers are not seeking to alter a provision of the Cap Gemini agreement as much as to nullify a provision that contradicts the Code.

As to protecting the public fisc, the best strategy almost certainly lies in having a code of tax laws that cannot be disregarded when it might suit taxpayers financially to do so. The "whipsaw" effect of inconsistent tax filings, an evil that the Court of Appeals ostensibly sought to avoid (Pet. App. 17a), cannot be prevented by leaving to the parties a decision as to the tax consequences that the IRS has no way of detecting without an audit of each taxpayer. In the absence of a tax provision requiring disclosure by the parties with their returns of an agreed date for reporting income,[5] the IRS is no better off in deferring to a decision of the parties than in relying upon the voluntary compliance by the parties with the clear standards of taxation embodied in section 451 of the Code and the regulations thereunder.

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5. As an example of such a disclosure obligation, section 1.1060-1(e) of the Treasury Regulations requires that the seller and purchaser of a group of assets making up a trade or business file an information return (Form 8594) showing the agreed allocation of the purchase price among the assets when goodwill or going concern value attaches or could attach to the assets. 26 C.F.R. § 1.1060-1(e).

Second, the decision of the Court of Appeals, if not overturned, would undermine two principles uniformly applied by this Court in interpreting the nation's tax laws – the importance of substance over form in determining the tax consequence of a transaction and the inviolability of the provisions of the Code against challenges by taxpayers who might seek a different outcome than the Code prescribes.

The Court of Appeals made no secret of its elevation of the form of the agreement – the expression of intent that all of the shares credited to the selling partners be taxable at the Closing – over the substance of the transaction which denied any significant benefit from the shares to the partners until the condition of their continued employment had been met and the attendant risk of forfeiture of the shares had lapsed. As the Court noted,

> To put it plainly, we have bound taxpayers to the 'form' of their transaction when they attempt to recharacterize an otherwise valid agreement bargained for in good faith. We have also refused to entertain arguments that the 'substance' of their transaction triggers different tax consequences.

Pet. App. 16a (citations and internal quotation marks omitted). Yet it is a salient feature of this Court's tax jurisprudence that the characterizations that taxpayers place on their own transactions cannot dictate the tax results. "To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective

administration of the tax policies of Congress." *Comm'r v. Court Holding Co.*, 324 U.S. 331, 334 (1945) (holding that, notwithstanding language of a sale agreement to the contrary, the seller of an apartment house was a corporation and not its shareholders).

The substance of the Cap Gemini transaction was that Robert Bergbauer and the other selling shareholders received limited immediate value from the shares deposited in the Restricted Account as long as they could not control those shares and bore a substantial risk that the shares would be forfeited due to circumstances, a termination by CGE&Y for "poor performance," that was beyond their control. In the face of such substantial restrictions and limitations upon their enjoyment of the shares, they could not actually or constructively receive the shares until those restrictions and limitations lapsed. 26 C.F.R. § 1.451-2(a); *see North Am. Oil Consol. v. Burnet*, 286 U.S. at 423 (holding that there was "no constructive receipt" by an oil company of profits from company land operated by a receiver until "there was a right in the company to demand that the receiver pay over the money"); *see also Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203, 209 (1990) (concluding that, notwithstanding some economic benefit derived by a utility company from customer deposits and the lack of segregation of those deposits from the company's general funds, the deposits were not income to the company, with this Court stating, "The key [to whether a taxpayer has 'complete dominion' over a given sum and is taxable on that sum] is whether the taxpayer has some guarantee that he will be allowed to keep the money.").

The Court of Appeals decision also would undermine the administration of the tax laws in making their operation subservient to the wishes of taxpayers as expressed in their agreements. This Court wisely cautioned against any such substitution of fairness or expedience for the considered judgment of the Congress. What this Court recited of tax deductions, that they do "not turn upon general equitable considerations . . . but rather . . . upon legislative grace," *Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co.*, 417 U.S. at 148, applies to section 451 of the Code and the regulations thereunder that dictate when income becomes taxable to its recipients. The latter are no more susceptible to alteration by agreement or the will of a taxpayer than the former.

CONCLUSION

In order to sustain the integrity of the provisions of the Code and the regulations thereunder in determining the timing of the taxation of income against formalisms or contrary dictates in the agreements of taxpayers, this petition for certiorari should be granted.

Respectfully submitted,

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